CIVIL TRIAL MATERIALS

By Clifton M. Mount, Esquire, ©2021

I. TO SUE OR NOT TO SUE

The initial evaluation that must be made in any civil case is whether to "sue, or not to sue." This decision is really one of balancing cost versus benefit. It is truly an economic decision at its heart. Litigants are often emotionally vested in their issues. Even corporate clients are made up of human beings who may be angry about a certain situation. Fundamentally, no one, even those with the deepest of pockets, wants to retain a lawyer, get bogged down in the litigation process, incur legal fees, and live with the stress of an ongoing, and often time consuming lawsuit.

The decision of whether to sue or not can be easily summed up thusly: does the client wish to spend, for example, Fifty Thousand Dollars on legal fees and costs in order to collect Sixty Thousand Dollars? The net in this example is Ten Thousand Dollars. It should also be mentioned that judgments often are uncollectible. Absent insurance covering the claim, a defendant may have no real assets; may declare bankruptcy wiping out the judgment; and/or appeal, adding what amounts often to years, and more legal fees associated with the litigation process. Finally, to add insult to injury, the recent coronavirus pandemic has caused a large backlog, if not a complete cessation, of civil trials due to inability to open court houses to jurors, parties, lawyers, and witnesses, as well as a traffic jam of criminal cases that will be heard before the civil cases.

The decision of whether to sue or not to sue is subjective, and requires thought and judgment. The lawyer should fully advise the client of the risks, and potential down sides. The

impact on individuals can be constant long term stress. For corporate entities, key personnel, executives, resources, possibly confidential information, and many other disruptions to the business of the business are usually required to conduct the litigation.

To quote Dylan Thomas:

"Do not go gentle into that good night."

II. SUMMONS AND COMPLAINT

Okay, so your client has made the final decision to file suit. As the lawyer, you must prepare a complaint. Most rules of civil procedure say something to the effect that a complaint should be a "short and plain statement." In my personal experience, abide by this statement. Get to the point. The idea is to give notice to the other side that you and your client believe the defendant(s) did something to damage your client, and why.

Some simple advice: include all of the defendants believed to be liable in the same complaint, even if not all counts apply to all defendants. Many lawyers feel it is appropriate to attach copies of documents to complaints, e.g., copy(ies) of involved contract(s), insurance policy(ies), etc. I have been trained otherwise, as one is not to "plead evidence." Save the pleading of evidence for summary judgment. Courts will not decide a case simply on the basis of the complaint with a document attached.

For the ad damnum, check your jurisdiction's rules. Some jurisdictions require the demand for a specific sum. Some jurisdictions require on a number be pled equal to, or above the jurisdictional minimum, or an "amount to be proved at trial of this matter."

Note, also, that either party may request a jury trial (assuming the sole purpose of the suit is not an interpretation by the court of an insurance policy or other document). Once a party demands a jury trial, it is nearly impossible to convince a court not to conduct a jury trial.

A summons must also be issued. Some courts require a draft be submitted by counsel for the clerk to stamp/sign. Other courts will issue them, and return them to counsel for service with the complaint, and possibly other documents such as an initial scheduling order. The summons is a court order mandating the defendant(s) appear, and answer by a time certain. A party may answer with an Answer, or some sort of dispositive motion. The jurisdictions where I practice require business entities appear through counsel. I believe most jurisdictions have similar requirements.

Service of the summons and complaint may be personal, through a registered agent for a business entity, or through alternative methods, such as publication when permitted by the court.

III. DISCOVERY

Service has been perfected. Answer has been filed. Scheduling Order has been entered. The gloves now come off, and it is time to examine the opposing party's case. As part of the initial decision by the client as whether to sue or not, the client must be counseled as to the burdens, and expense of the typical discovery process. Documents and electronically stored material must be assembled and reviewed prior to production for privileged material, proprietary information, trade secrets, etc. Redactions may be required.

Written discovery must be drafted, and sent to the other side as well. This task, alone, may be time consuming, and expensive.

Executives, employees, staff, etc. may be called for depositions, interviews, assistance with answering discovery and litigation related support, and knowledge. The discovery process, as a whole, may be very disruptive to a business' life. If the client is an individual, for example, in a divorce case, his or her life may be disrupted as well. Gathering old bank and tax records may be required, and may be time consuming. Individuals, generally, must go to work. Taking time to prepare for, and give a deposition may interrupt an individual's work life.

The complexity, drudgery, expense, and generally disruptive nature of the discovery process should be discussed fully with the client prior to filing suit.

Several other discovery "tools" may arise – there may be "independent medical examinations" in personal injury cases; there may be site inspections of real property or other locations, particularly in construction defect type cases; experts must be located, develop opinions, be fed information on which to base their opinion(s); expert reports generally have to be drafted, and served on the opposing party(ies). Experts, generally, do not work for free. Requests for admission can also be a very powerful tool, and may be used to streamline a case.

To reiterate, discovery is probably the most expensive, and burdensome chapter in the vast majority of civil cases. Its goal should be to work towards a resolution. The client should be advised of these facts very early.

IV. SUMMARY JUDGMENT MOTIONS

Many inexperienced litigators believe a case will be disposed of by way of summary judgment. Create a good record, obtain affidavits, and attach excerpts of depositions. File the motion, and a reply to the opposition. In my experience, fewer and fewer courts will grant

summary judgment, even in what one might believe to be a clear cut case. Summary judgment motions are expensive to put together. Summary judgment is generally disfavored by courts.

In fact intensive cases, there, inevitably, will be a question of fact unresolved by the discovery record. Overall, the majority of judges want the case to go to trial if it is not settled.

Some lawyers believe trial judges are averse to granting summary judgment as they are fearful of being reversed on appeal. I genuinely believe experienced trial judges are not of this persuasion. It seems to have become judicial policy not to try and resolve a case on summary judgment.

The exception to this rule are contract cases. Where the sole issue, and truly, the sole issue, is the interpretation of a contract, insurance policy, or other written document, I have no problem recommending moving for summary judgment. It is helpful if both sides can stipulate to the authenticity of the document in question, and can agree on framing the discreet issue for the judge to address. Generally, the easier lawyers can make it for a judge to make a decision, the happier the judge will be.

V. **TRIAL – BENCH OR JURY?**

I am a firm believer that the more actual trial experience one has, the more likely one will be able to settle a case. A very famous Washington, D.C. lawyer who, sadly, passed several years ago, Jake Stein, wrote many columns for The Washington Lawyer Magazine. A memorable one was where he distinguished between “trial lawyers” and “litigators.” In Jake’s view, trial lawyers prepared for trial, the day a new case walked into his office. Trial lawyers had picked juries.

To Jake, "litigators" pushed paper around, wrote well researched pleadings, sent out bills, then figured out how to settle. Jake was spot on.[1]

The reason actual trial experience makes it easier to settle cases, is, as in most communities, lawyers have reputations. If others know one will "take it to the hoop," they will know one is not posturing during settlement negotiations, and work towards a settlement. Settlements are, generally, better for a client's bank account, and the blood pressure levels of all involved persons.

Some cases, however, just need to be tried. Jury trials should, almost, always, at a minimum, be prayed at the outset. The parties can always agree later to try the case to the bench. Some cases are required to be tried to the bench - e.g., those involving the interpretation of legal documents, which is not for a jury.

At any rate, get into court any way you can – even pro bono. It will make you a better, more successful lawyer.

VI. APPEAL

With COVID, civil dockets are extra slow, if not dead in the water for a while. In Washington, D.C., Judge friends of mine are telling me there will not be a civil jury trial until 2023. Clients looking for immediate gratification should be so advised to "hurry up and wait."

[1] Jake lived, thankfully, into his nineties, and was an old school elegant, gentleman. He represented the only Watergate Defendant who went to trial, and was acquitted. A life well lived.

Add on an appeal. Appellate courts, in my experience are notoriously slow. After waiting for the COVID criminal dockets to clear, then trying a civil case, an appeal will take even more years.

With that said, I have been in appellate courts on numerous occasions. Oral argument, in my view, is a "dog and pony show." Appellate panels have, generally, made up their minds on the briefs before oral argument. A wise mentor of mine once said, "The older I get, the shorter my briefs get."

Choose one to three discreet issues. Brief them succinctly. Make it easy for the judges to understand you have a legitimate argument(s), and make it easy for them to go your way.

In appellate courts, authority is important - more so than at the trial level, as trial judges have been known to simply ignore authority. These facts are probably not what you were taught in law school, but these facts are reality. Do your research for an appeal.

Sometimes, the mere noting of an appeal can move the opposing party to the settlement table simply to stop the litigation process. This is not to suggest noting an appeal in bad faith, but, everyone has their limitations. Settlement should always be on your mind.

VII. GENERAL POINTERS

A wise trial practice professor of mine, Wilson Parker, at Wake Forest University School of Law, said to the class, "when you try a case, if you are a roll on the floor, and beat your chest kind of person, do it. If you are a low key personality, do that. Just don't be something you are not. Juries are smart, and don't like disingenuousness."

Truer words were never spoken. Some people say trial work is theater. It is not. It is about fact and law. Right and wrong. There is certainly an element of a "popularity contest." Do not make juries dislike you, or your client. Jurors may not have gone to law school, but that does not mean they are not intelligent, and good at evaluating facts, credibility, and people.

Do not speak in "legalese" to jurors. Trial is not the time to tell the room you were law review. Speak simply, and directly. Do not be condescending, but make it easy for the jury to understand your point(s). Simplify, simplify, simplify. There is an old saying, "it is harder to write a three page brief, than a 15 page brief."

Do some thinking before trial. Do not just plan. Condense.

Personally, I do not try and write a script for every question and/or argument I intend to ask/make at trial. It can be too confining, and trials are very fluid animals. Things change on a dime. One must be able to adapt. Outlines are my go to form of trial note book.

Listening to the witness is of utmost importance. Do not ask a scripted question just because you wrote it down during trial preparation. Do not get bound by your script. The question may be already answered, be out of context, sound stupid in light of a witness' answer, etc. The jury will not like you if you waste their time.

For the most part, jurors do not want to be there. They generally take their jobs as jurors seriously, but they really might prefer being at work, home, on the golf course, etc. Thank them for their patience, time, and attention.

Keep your opening statement, and closing short. No one wants to hear a one hour lecture. This is part of the golden rule – simplify, simplify, simplify. Conserve words. People get it.

Even though trial looks like one is sitting all day, it is exhausting. Paying attention to witnesses, the jury, the judge, and opposing counsel all at once let alone the fundamental stress that goes with the job is physically, and mentally exhausting. Staying up until midnight before and during trial will likely be a disservice to your client. Be rested, and as calm as possible. Mental clarity is important. I strongly believe exercise is an important factor.

CONCLUSION

Trial work is demanding. It can be extremely rewarding to get a good result for your client. Clients put themselves in your hands. Never lose sight of that.

You are not the most important person in the room. Your client is.